

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1911.

No. 2320.

841

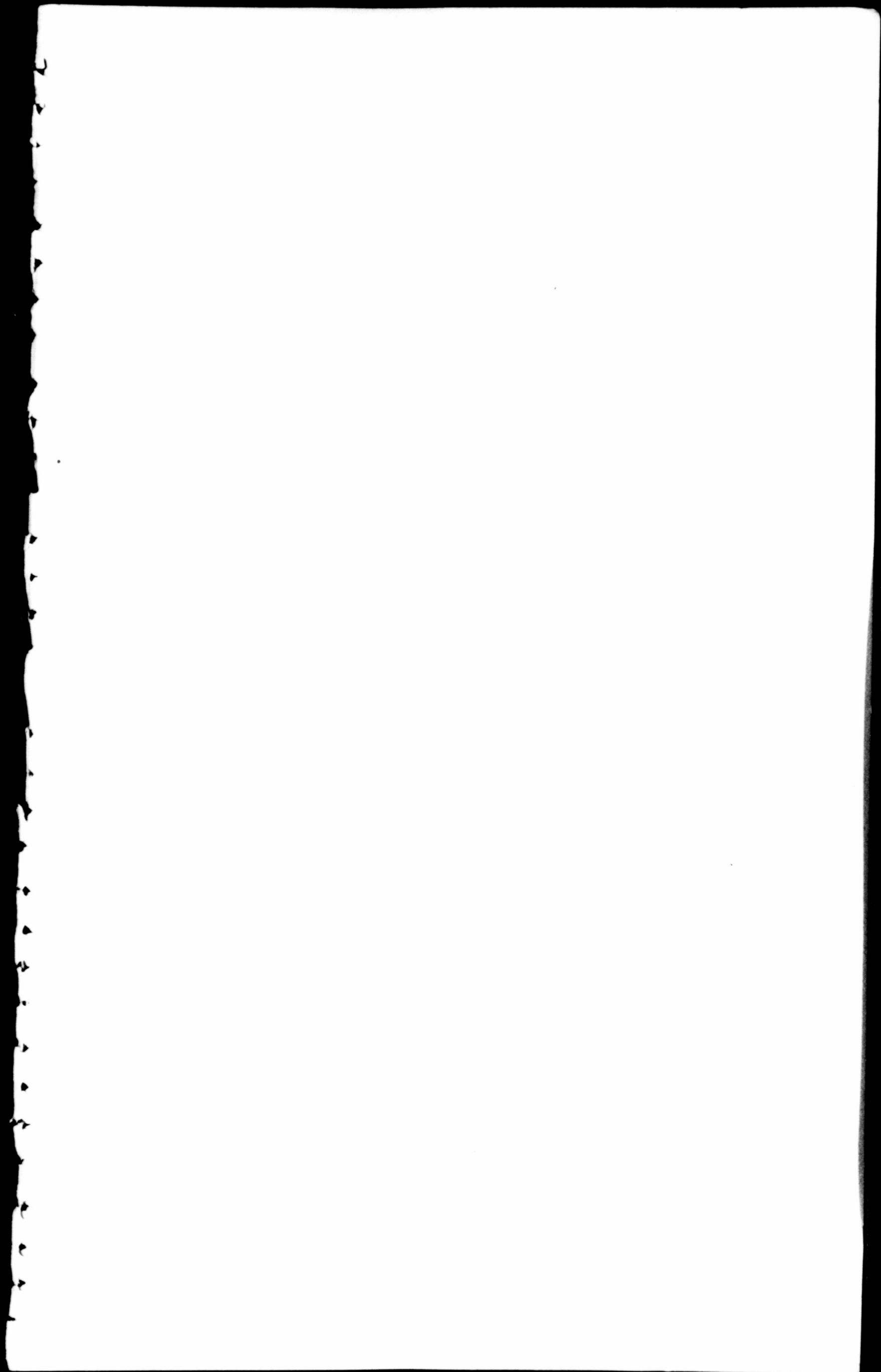
FOLTZ AND FULLER, INCORPORATED, APPELLANT,

vs.

CALEB W. W. FULLER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JUNE 19, 1911.



COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1911.

No. 2320.

FOLTZ AND FULLER, INCORPORATED, APPELLANT,

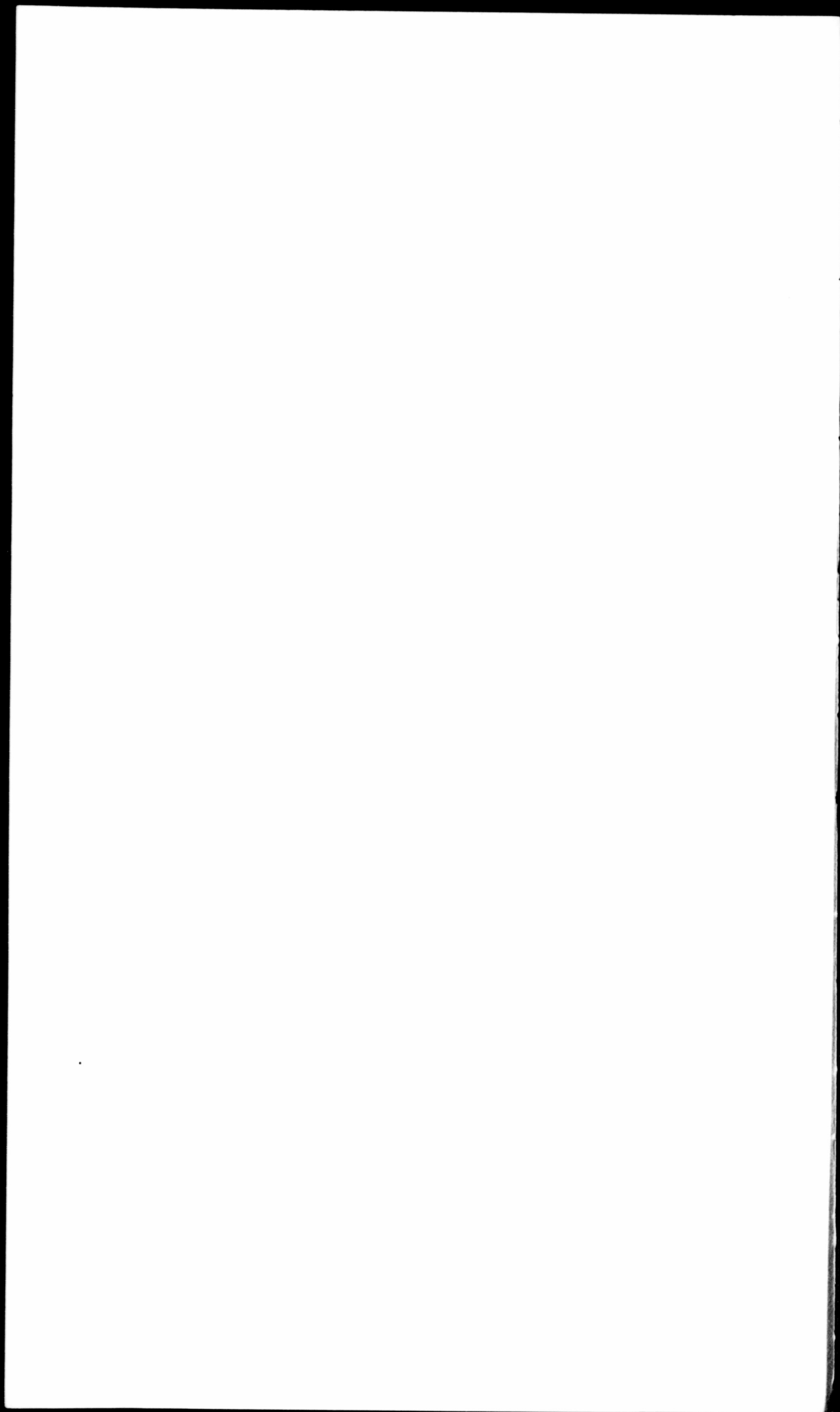
vs.

CALEB W. W. FULLER, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

INDEX.

	Original.	Print
Caption	<i>a</i>	1
Particulars of demand.....	1	1
Affidavit of Caleb W. W. Fuller	2	2
Summons	4	3
Marshal's return.....	4	3
Undertaking on appeal.....	5	4
Certificate of clerk on appeal	6	4
Motion to vacate judgment	8	5
Motion for new trial argued and submitted	9	6
Verdict, rendered February 6, 1911, set aside and new trial ordered.	9	6
Plea for counter-claim and notice to produce papers.....	9	6
Replication	12	7
Memorandum: Verdict for plaintiff.....	13	8
Motion for new trial	13	8
Motion for new trial overruled and judgment on verdict ordered; judgment; appeal.....	14	8
Memorandum: Appeal bond approved and filed.....	15	9
Time in which to present bill of exceptions extended	15	9
Time in which to submit bill of exceptions and file transcript ex- tended	15	9
Bill of exceptions made part of record and time to file transcript further extended	16	9
Bill of exceptions.....	16	10
Designation of record on appeal	31	17
Time to file record further extended	32	17
Clerk's certificate.....	33	18



In the Court of Appeals of the District of Columbia.

No. 2320.

FOLTZ AND FULLER, INCORPORATED, Appellant,
vs.
CALEB W. W. FULLER.

a Supreme Court of the District of Columbia.

No. 52830. At Law.

CALEB W. W. FULLER, Plaintiff,
vs.
FOLTZ & FULLER, INCORPORATED, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Particulars of Demand.*

Filed August 6, 1910.

In the Municipal Court of the District of Columbia.

No. 52830.

CALEB W. W. FULLER, Plaintiff,
vs.
FOLTZ & FULLER, INCORPORATED, Defendant.

Tosalary for services rendered in managing the mechanical production and distribution of the said defendant corporation's goods, at the rate of \$1,000. per annum—

June 1, 1910 to July 1, 1910.....	\$83.33 $\frac{1}{3}$
July 1, 1910 to July 16, 1910 (inclusive).....	41.66 $\frac{2}{3}$

Total	\$125.00
-------------	----------

LEON PRETZFELDER,
Attorney for Plaintiff.

Affidavit.

Filed August 6, 1910.

In the Municipal Court of the District of Columbia.

* * * * *

DISTRICT OF COLUMBIA, ss:

CALEB W. W. FULLER, first having been duly sworn upon his oath, deposes and says:

2 That he is the plaintiff in the above entitled cause in which the Foltz & Fuller, Incorporated, is named as defendant; that he has a good cause of action against the said defendant, for that, on to wit, the 22nd day of March, 1910, after said defendant Company had filed its certificate of incorporation in the Office of the Recorder of Deeds of the District of Columbia, in accordance with law, the incorporators met for the purpose of perfecting their corporation, at, to wit, premises No. 812 F Street, Northwest, in the City of Washington, in the District of Columbia, and at said meeting it was mutually agreed between the trustees of said corporation that the said plaintiff, this affiant, who was then and is now a trustee of said corporation, was to be the Secretary of said corporation for the period of one year, and was to devote his entire time and services to the said corporation for the period of one year, it being his duty to manage the mechanical production and distribution of the said defendant corporation's goods, in addition to his duties as secretary, and it was agreed that he should receive as compensation for said services the sum of one thousand dollars (\$1,000.) for the first year, payable in monthly instalments of fifty dollars (\$50.) in cash, and thirty-three and one-third dollars (\$33.33 $\frac{1}{3}$) to be credited monthly on his stock account, and in pursuance of said verbal agreement of contract for services, a resolution was passed by the trustees of said corporation, which said resolution is incorporated in the minutes of the said meeting

3 of March 22, 1910, and which said minutes were approved on June 6, 1910.

Affiant further states that in pursuance with said contract with the said corporation, he has fully performed his duties, and was paid for his services in accordance with the terms of the contract to and including the 1st day of June, 1910, but says that since that time, although he has continued to perform his said duties in accordance with the said contract, the President and Treasurer of the said corporation, both offices being vested in the same person, has refused, and does now refuse to pay him for the said services as had been agreed upon by contract of the parties; that he is willing to accept the sum due him in cash in accordance with the terms of the contract, and to have the balance applied to the credit of his stock account, but he is advised that this Court has no jurisdiction to compel specific performance of the contract, but he is advised that it has jurisdiction to give damages as a result of a breach thereof, and therefore affiant requests that the money value of his services be awarded him, to wit the sum

of \$125.00, to which he is entitled as is shown by the particulars of demand hereto annexed and made a part hereof; that the above sum is the sum which is justly due and overdue and is now owing him; that it is the sum which was agreed to be paid him by the terms of said contract; that the defendant has absolutely refused to pay him any amount whatsoever for his said services performed since the said 1st day of June, and that he is entitled to recover \$125.00, exclusive of all set-offs and just grounds of defense, besides costs of this suit.

CALEB W. W. FULLER.

4 Sworn to and subscribed before me this 19th day of July,
A. D., 1910.
[SEAL.]

BLANCHE NEFF,
Notary Public, D. C.

Summons.

Filed August 6, 1910.

In the Municipal Court of the District of Columbia.

* * * * *

The President of the United States to the defendant, Foltz and Fuller, Inc., Greeting:

You are hereby summoned to appear in this Court on the 26 day of July, A. D., 1910, at 10 o'clock A. M., to answer the plaintiff's suit against you for \$125.00 and costs.

Witness the Honorable Judges of said Court this Jul- 19 1910.

F. G. AUKAM, *Clerk.*
BLANCHE NEFF,
Assistant Clerk.

Marshal's Return.

5 Served copies of the bill of particulars, affidavit, and this summons, on the Defendant, by service on P. M. Foltz, Vice President of the Defendant Corporation, the 20th day of July 1910.

AULICK PALMER,
U. S. Marshal,
By VIRGIL G. WILLIAMS, *Deputy.*

(Endorsed.)

JULY 26, 1910.

Judgment on aff'd't for pl'ff for \$125 with interest on \$125 from date and costs.

THOS. H. CALLAN, *Judge.*

Undertaking on Appeal.

Filed August 6, 1910.

In the Municipal Court of the District of Columbia.

* * * * *

The defendant desiring to appeal from the judgment rendered against it in the above-entitled cause, on the 26th day of July 1910, to the Supreme Court of the District of Columbia said defendant, Foltz and Fuller, Inc. and The Illinois Surety Company, doing business at 615 Bond Bldg., Washington, D. C. their surety hereby appearing and submitting to the jurisdiction of the said Supreme Court, undertake, jointly and severally, to satisfy and pay whatever final judgment may be recovered in the said Court, against said de-
 6 fendant, which judgment they agree may be entered against them jointly, or either of them separately in this case.

Given under our hands this 2d day of August 1910.

FOLTZ & FULLER, INCORPORATED.

By FRED B. RHODES, *Att'y.*

ILLINOIS SURETY COMPANY. [SEAL.]

By LOUIS L. PERKINS, *Attorney in Fact.*

Approved August 2d 1910.

C. S. BUNDY, *Judge.**Certificate of Clerk on Appeal.*

Filed August 6, 1910.

In the Municipal Court of the District of Columbia.

* * * * *

Date.	Proceedings.
1910.	
	Plaintiff's attorney—L. Pretzfelder.
	Defendant's " —F. B. Rhodes.
July 19th.	Particulars of demand—affidavit and notice to produce filed. Summons and copy issued returnable July 26—10 A. M.
" 20th.	Summons returned "summoned as within directed," etc.
" 26th.	Trial—ex parte.
" "	Judgment for plaintiff on affidavit, for \$125.00 with interest from date and costs.
7	
July 28th.	Motion for new trial and affidavit filed.
" 29th.	" " " " overruled.
" 30th.	Appeal, notice of, filed.
August 2nd.	" undertaking in, with Illinois Surety Co., surety, approved and filed.
" 5th.	Appeal, record on, and papers filed with Clerk of Supreme Court, D. C.

This is to certify, that the foregoing is a true copy of the Docket Entries and of all the proceedings had before the said Court in the above cause, and that the annexed documents are all the original papers filed in said cause.

Witness the Honorable Judges of said Court this 5th day of August A. D. 1910.

Costs paid by Plaintiff.....	\$1.60
Costs paid by Defendant.....	\$1.75

F. G. AUKAM, *Clerk*,
By BLANCHE NEFF,
Assistant Clerk.

(Endorsed.)

The Clerk will please docket this appeal, enter my appearance and issue Summons to Appellee.

FRED B. RHODES,
Att'y for Appellant.

8

Motion to Vacate Judgment.

Filed February 6, 1911.

In the Supreme Court of the District of Columbia.

At Law. No. 52830.

CALEB W. W. FULLER, Plaintiff,
VS.
FOLTZ-FULLER COMPANY, INC., Defendant.

Now comes Fred B. Rhodes, attorney for the defendant in the above entitled cause and moves the Court to set aside the judgment rendered therein by default for the reasons set forth in the accompanying affidavits.

FRED B. RHODES,
Attorney for Defendant.

To Leon Pretzfelder, Esq., Attorney for Plaintiff:

Please take notice that the foregoing motion will be for hearing on Friday, February 10, at which time I will read to the Court the accompanying affidavits of Fred B. Rhodes and George R. Shields.

FRED B. RHODES,
Attorney for Defendant.

Service accepted this 6 day of February, A. D. 1911.

LEON PRETZFELDER,
Attorney for Plaintiff.

Supreme Court of the District of Columbia.

FRIDAY, *February 10th*, 1911.

Session resumed pursuant to adjournment. Hon. Job Barnard, Justice presiding.

* * * * *

Before Chief Justice.

Come now the parties hereto by their respective attorneys of record, whereupon defendant's motion for a new trial filed herein is argued and submitted to the court.

FRIDAY, *February 17th*, 1911.

Session resumed pursuant to adjournment. Hon. Job Barnard, Justice presiding.

* * * * *

Before Chief Justice.

Upon consideration of defendant's motion filed herein by its attorney of record, the verdict rendered herein on February 6th, 1911, is hereby set aside and vacated and a new trial of this cause is hereby ordered.

Plea for Counter Claim and Notice to Produce Papers.

Filed March 21, 1911.

* * * * *

Now comes the defendant and shows to the court that the plaintiff, at the commencement of the suit aforesaid, was and still is
10 indebted to the defendant in the sum of sixty-six dollars and sixty-seven cents (\$66.67), and that since the instituting of the suit the plaintiff has become further indebted to the defendant in the further sum of two hundred and sixty-six dollars and sixty-six cents (\$266.66), for that whereas the plaintiff on the 22nd day of March, 1910, subscribed for forty (40) shares of the capital stock of the defendant corporation and agreed to pay therefor the par value of ten dollars (\$10.00) per share, the said payments to be made at the rate of thirty-three dollars and thirty-three cents (\$33.33) per month until the full amount of the subscription was paid.

At the time of the institution of this suit the plaintiff was in default in his subscriptions for two payments of thirty-three dollars and thirty-three cents (\$33.33) each, namely, for the months of June and July 1910, and since the institution of this suit by the plaintiff he has made further default for the months of August to December inclusive, 1910, and January to March, inclusive, 1911, making a total indebtedness to the said defendant of the sum of three hundred and thirty-three dollars and thirty-three cents (\$333.33), which sum or

any part thereof the plaintiff has refused, and still refuses to pay, notwithstanding he has been often requested so to do. The defendant further represents to the court that it is willing that any part of the plaintiff's judgment which may be found just and due may be set off against the indebtedness above described.

FOLTZ-FULLER CO., INCORPORATED,
By ELBIE K. FOLTZ.

11 Elbie K. Foltz on oath deposes and says that he is the president of the defendant corporation, that he has read the foregoing counterclaim; that the facts therein stated upon knowledge are true, and those stated upon information and belief, he is informed and believes to be true.

ELBIE K. FOLTZ.

Subscribed and sworn to before me this 21st day of March, 1911.

[SEAL.]

FRANCIS L. NEUBECK,
Notary Public, D. C.

* * * * *

Leon Pretzfelder, Esq., Attorney for Plaintiff:

Please take notice that you are requested to produce at the trial in the above entitled cause the copy of the minutes of the defendant corporation dated March 22, 1910, produced by you and offered in evidence at the previous trial of this cause before Mr. Justice Cla-
baugh.

FRED B. RHODES,
Attorney for Defendant.

Service of accompanying papers acknowledged this 21st day of March, 1911.

LEON PREZTFELDER,
Att'y for Plaintiff.

12 *Replication.*

Filed March 22, 1911.

* * * * *

Comes now the plaintiff, and for answer to the plea of counterclaim filed herein by the defendant says that it is not true that he is indebted to the defendant in the sum of \$333.33, or in any sum whatsoever now nor at any other time whatsoever, and that it is not true that he subscribed for forty shares of the capital stock of the defendant corporation, or for any other number of shares, on the 22nd day of March, 1910, or at any time or date whatsoever, but says that he did agree to take forty shares of the corporate stock of the company, verbally, and upon the condition that he would be allowed to pay for the said forty shares by his services.

Plaintiff further says that the year's contract will expire on the first day of April, next, and says that there is now due and owing him

by virtue of said contract, the full sum of one thousand dollars, from which amount he is willing to have off-set any sum which it may be found he had earned by performing services elsewhere during the period of April 1, 1910, to April 1, 1911, and he requests that he be given judgment for such amount.

LEON PRETZFELDER,
Attorney for Plaintiff.

13

Memorandum.

March 23, 1911.—Verdict for Plaintiff for \$75.00.

Motion for New Trial.

Filed March 28, 1911.

* * * * *

Now comes the defendant and moves the court to set aside the verdict rendered in the above entitled cause and grant a new trial on the following grounds:

1. That the Court committed error in not granting the motion of the defendant to direct the jury to return the verdict for defendant.

2. That the verdict of the jury was not warranted by the evidence in the cause.

FRED B. RHODES,
Attorney for Defendant.

Leon Pretzfelder, Esq., Attorney for Plaintiff:

Please take notice that the foregoing motion will be for hearing on Friday the 31st day of March, A. D. 1911, or as soon thereafter as counsel can be heard.

FRED B. RHODES,
Attorney for Defendant.

14 Service accepted this 28th day of March 1911.

LEON PRETZFELDER.

Supreme Court of the District of Columbia.

FRIDAY, *March 31st*, 1911.

Session resumed pursuant to adjournment, Hon. Job Barnard, Justice presiding.

* * * * *

Upon consideration of defendant's motion for a new trial filed herein by its attorney, it is ordered, that said motion be, and the same is hereby overruled and judgment on verdict is ordered. Wherefore, it is considered, that the plaintiff herein recover of defendant herein and The Illinois Surety Company, its surety, the sum of Seventy-Five Dollars (\$75.00) with interest from this date, together

with costs of suit to be taxed by the clerk, and have execution thereof. From the foregoing the defendant by its attorney in open court, notes an appeal to the Court of Appeals of the District of Columbia, whereupon, the penalty of a bond, to operate as a Supersedeas, is hereby fixed in the sum of One Hundred and Fifty Dollars.

15

Memorandum.

April 10, 1911.—Appeal bond approved and filed.

Supreme Court of the District of Columbia.

FRIDAY, *May 12th*, 1911.

Session resumed pursuant to adjournment, Hon. Job Barnard, Justice presiding.

* * * * *

Before Chief Justice.

Pursuant to agreement of the parties hereto by their respective attorneys of record, the time within which to present to the Court the Bill of Exceptions herein, for settlement, is extended to and including the 24th of May 1911.

FRIDAY, *May 19th*, 1911.

Session resumed pursuant to adjournment, Hon. Job Barnard, Justice presiding.

* * * * *

Before Chief Justice.

Pursuant to agreement of the parties hereto by their respective attorneys of record, the time within which to submit the Bill of Exceptions herein, and to file a transcript of the record herein in the Court of Appeals of the District of Columbia, is hereby extended to May 29th, 1911.

16

MONDAY, *May 29th*, 1911.

Session resumed pursuant to adjournment, Hon. Job Barnard, Justice presiding.

* * * * *

Before Chief Justice.

The Court having this day signed the Bill of Exceptions, taken at the trial of this cause, now orders the same of record nunc pro tunc.

Further pursuant to agreement of counsel herein, the time within which to file a transcript of the record herein in the Court of Appeals of the District of Columbia, is hereby extended to and including the 6th day of June, 1911.

Bill of Exceptions.

Filed May 29, 1911.

* * * * *

Be it remembered that at the trial of this cause before Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, and a jury regularly empaneled and sworn to try the issue pending between plaintiff and defendant, the plaintiff to maintain and prove the issues upon his part joined, offered and gave to the jury the following testimony and none other.

CALEB W. W. FULLER, called as a witness by plaintiff, testified as follows: that on or about March 22, 1910, he, together with ElBie K. Foltz and Pierre M. Foltz, organized a corporation known as the Foltz-Fuller Company Inc.; that said ElBie K. Foltz and Pierre M. Foltz were brothers and that the latter was a brother-in-law of witness.

That on or about the date mentioned, the parties having filed their certificate of incorporation, met in the City of Washington, D. C., and perfected their said organization by adopting by laws and electing officers; that there had been an informal meeting on or about the 17th day of March, 1910, at which time the question of employment of plaintiff had been discussed; that it had been agreed at said meeting that plaintiff should be a trustee and the secretary of the corporation when perfected and in addition should be employed by the corporation to devote his entire time to its service—the Foltz Brothers both being employed elsewhere and not desiring to give up their positions.

That ElBie K. Foltz said: “Cale will give his time to the company and we will give him, say, nine hundred dollars per year—well, say, a thousand dollars for the first year; that is about as much as we can afford to start; we will give him more next year—I hope so anyway”; and that he understood from the language used on this occasion that he was to be employed for a period of one year and was to receive one thousand dollars for the year’s employment; that he agreed verbally to subscribe for 40 shares of the corporate stock of the company of the par value of \$10 per share and also signed a stock agreement to the same effect; that he, witness, agreed to pay for the same by having deducted from his monthly salary the sum of \$33.33 $\frac{1}{3}$ per month, leaving \$50 to be paid him in cash for his services; that the Foltz Brothers knew he had no other means of paying for said stock than by said deduction from his salary.

The plaintiff thereupon offered in evidence a book containing what purported to be the proceedings of the meeting of March 22 and other meetings of the corporation held June 6, June 8 and Sept. 30, 1910, and identified the same as having been written by himself as secretary of the corporation, said minutes reading as follows:

“WASHINGTON, D. C., March 22, 1910.

Messrs. ElBie K. Foltz, Pierre M. Foltz and Caleb W. W. Fuller, having filed their incorporation certificate, met at #812 F Street

N. W. (residence of Mr. P. M. Foltz), to perfect their organization. Bylaws were read and unanimously adopted as follows:

1. The officers of this company shall consist of (1) a president and treasurer, (2) a vice president, and (3) a secretary, to be elected for a term of one year.

2. It shall be the duty of the president and treasurer to manage the business and finance of the company.

3rd. It shall be the duty of the vice president to manage the art features of the company.

4th. It shall be the duty of the secretary to keep the official records as required by the law of the District of Columbia, and to manage the mechanical production and distribution of the company's goods.

5th. The policy of the company shall be subject to approval of the majority of stock held therein.

6th. The officers shall confer with each other upon all doubtful questions without formally calling a meeting thereof.

The following officers were then unanimously elected for one year: ElBie K. Foltz, president and treasurer; Pierre M. Foltz, vice president; Caleb W. W. Fuller, Secretary.

The memorandum stating the business of the company was approved and paper filed. The lease of a place of business at #417 Ninth Street, N. W., was approved and filed.

It was agreed the secretary should devote his entire time to the business and receive as compensation one thousand dollars for the first year payable as follows: fifty dollars cash per month and balance credited on his stock account.

Messrs. ElBie K. Foltz, Pierre M. Foltz and Caleb W. W. Fuller were elected trustees to serve for the first year.

The meeting then adjourned subject to call.

C. W. W. FULLER, *Sec'y.*

Approved June 6, 1910.

[ELBIE K. FOLTZ],*
PIERRE M. FOLTZ,
C. W. W. FULLER,
Trustees.

20

WASHINGTON, D. C., *June 6, 1910.*

At a meeting of the trustees held at our place of business 417 Ninth Street, N. W. The minutes of March 22nd *was* read and approved and certificates of stock *was* issued.

C. W. W. FULLER, *Sec'y.*

Approved Sept. 30, 1910.

WASHINGTON, D. C., *Sept. 30, 1910.*

Minutes of June 6th read and approved. Minutes of June 8th were called up and not being written up the record was ordered to be made as follows:

[* Words enclosed in brackets erased in copy.]

ElBie K. Foltz removed his name from the minutes of March 22nd, stating they were incorrect and approved under a misunderstanding by him. This meeting of the 8th had been called for the 7th and was laid over on account of the presence of a business — called in the office. After a general discussion of the business affairs this evening it was agreed that ElBie K. Foltz should make arrangements to sell the business subject to approval of the trustees and Pierre M. Foltz was to carry on the business for the month, paying all expenses and take for his compensation all the profits except on business done before August 1, 1910.

C. W. W. FULLER, *Sec'y.*"

Thereupon witness testified further that he entered upon his duties at once, that is, after the meeting of March 22, although his contract was not operative until April 1st and continued therein until May 31st, at which time he was told by ElBie K. Foltz, the president and treasurer of the corporation, that his services would not be further required because the business of the corporation did not justify further continuation of his services; that Foltz told him at this time that he was sorry that the business did not justify his further employment and that he would be taken back when the business increased; that he, Foltz, would recommend him (Fuller) for another position if he desired or he would allow him to solicit orders on the outside on a commission basis.

That he, Fuller, protested against said discharge, and informed ElBie K. Foltz that under the terms of his employment he could not be discharged within a period of one year; that he continued to frequent the place of business of the corporation after May 31st and was ready and willing to perform service up to the time this suit was instituted in July 1910, but that he received no compensation for the period after May 31st.

He further testified that he had been employed at Johnson's photograph gallery since on or about August 1st at a salary of \$10 a week for part of the time and \$15 per week for the remainder; that he was still employed there at the time of giving his testimony and that his duties were those of managing and conducting a general photographic business.

He further testified that there was due him at the time of filing this suit the sum of \$125 covering his salary, which amount defendant had refused to pay.

22 On cross-examination witness testified that the business of the corporation lay chiefly in making lantern slides of medical subjects for use by lecturers and in addition the corporation was prepared for doing a general photographic business. That he had had previous experience in this line of work for a period of three or four months during which time he had worked with his brother-in-law, Pierre M. Foltz, for which services he had received no compensation. That at the time of his employment with defendant company and since that time he made his home with Pierre M. Foltz, his brother-in-law; that he had turned out approximately from 25 to 35 slides per day and admitted that he had spoiled some but stated that his percentage of waste was no greater than that of any other operator in

this line of work. He admitted that this number was not as large as that of a person who worked steadily during the day should be able to turn out but stated that it was his duty to devote only a portion of the time to the making of these slides; that it had been agreed that the other two trustees were to help out with this portion of the work in the evening hours and that it was his duty to work on the outside a portion of the time soliciting orders as well as to attend to all other routine business necessary to be transacted.

He admitted that he was to receive no salary as an officer; that he had subscribed in writing for 40 shares of the capital stock of the company, but stated that he did so with the understanding that he would be permitted to pay for the same in services. He admitted that he had not paid for all the stock, only \$66.66 having been credited on the stock account, representing the two months for which he had been paid for his services.

Whereupon the plaintiff, by his attorney, announced that he had no further testimony to offer and thereupon rested his case.

Thereupon ELBIE K. FOLTZ, president and treasurer of the defendant, produced in its behalf, after having first been duly sworn, testified as follows: that he is the president and treasurer of the defendant corporation; that it was distinctly understood before the organization of the corporation that no officer was to receive any salary for services as such officer; that at the time of employment of plaintiff he, witness, had suggested the plaintiff be given \$15 a week and plaintiff was asked whether that would be satisfactory. As plaintiff did not indicate whether or not he thought the sum sufficient witness then suggested \$18 per week, and he, witness, then added: "Oh, well, as it is so near a thousand, we will say a thousand dollars a year."

Witness testified, further, that it was his, witness's, distinct understanding that the plaintiff was simply to receive his salary at that rate and not that he was to be employed for a year; that the business of the company was an experimental one and all persons connected with it realized that the company might not be able to do business for any long length of time; that at the meeting of the board of directors it was distinctly stated that plaintiff was to be employed at the rate of \$1,000 per annum; that the minutes of the meeting of Mar. 22, 1910, heretofore produced in evidence, were not presented or read to the board by the plaintiff until June 6th. That said minutes were read by plaintiff and he, witness, did not think they were read as appeared in the record, or at least he did not understand them to be so read; that after the meeting he discovered that the minutes of the meeting had been reported so as to show that the plaintiff was to receive as compensation \$1,000 for the first year and fearing that this might be misconstrued he called a meeting of the board of directors the following day for the purpose of correcting said minutes and at this meeting he notified the plaintiff that the minutes were incorrect as the words "at the rate of" should be inserted. At this meeting witness removed his name from the minutes of the meeting, and he further testified that almost immediately after the em-

ployment of plaintiff it developed that plaintiff was absolutely incompetent to do the mechanical work for which he had been employed and which he had represented himself as being qualified to do. That he spoiled large numbers of slides and only did one-third of the amount of work which any person with ordinary experience and ability ought to have performed; that he was insubordinate in carrying out orders and was absolutely inefficient; that by reason of this he was discharged on the 31st day of May, 1910; that his salary was paid in full for the full term of his employment.

25 Witness testified further that at the time of the filing of this suit plaintiff was indebted to the defendant corporation for unpaid stock subscription in the sum of \$50 after allowing the plaintiff \$33.33 $\frac{1}{3}$ for the period of his employment, per month, and that this amount had not been paid although demand had been made upon him for same, and witness claimed that defendant corporation is entitled to the sum of \$50 by way of counterclaim.

Upon cross-examination witness denied that there had been an informal meeting as testified to by plaintiff on March 17th but did recall that there had been several informal conversations with regard to the organization of the company. He was positive that no promise had been made to employ plaintiff for one year. He testified that he, witness, was employed in the Hygienic Laboratory, worked there every day during the usual office hours; that he visited the corporation's office every day after his employment for the day was over and assisted in the carrying on of its business; that although he had no experience he himself had made and completed 75 of the slides between the hours of 7 and 10.30 in the evening and that an experienced workman who devoted his entire time to the work should during any day be able to turn out at least an equal number as a fair day's work. He testified that he had not seen the minutes of the meeting of March 22nd until after they were read at the meeting of June 6th; that he did not know whether or not the secretary had written them up prior to that time and that if they were in the office of the corporation he had not seen them. He admitted that he had been informed that plaintiff was a man of small means and
26 he had not expected him to pay for his share of the stock except as his salary accrued.

PIERRE M. FOLTZ, called as witness by the defendant, after being duly sworn, testified as follows: That he was one of the three directors of defendant corporation and a brother-in-law of plaintiff; that for three or four months prior to the organization of the Foltz-Fuller Co. Inc. plaintiff had worked in his office without compensation; that as a result of his observation he felt sure that plaintiff would not be able to do the work required but in view of his interest in him as a brother-in-law he was willing that he should be given a trial; that he was present at the informal meeting held by the three incorporators prior to the actual organization of the company; that he distinctly recalled the conversation with regard to the employment of plaintiff, and he further testified that the language of ElBie K. Foltz with reference to said employment was as follows: "Well, how would \$15

a week suit you?" to which there was no response. "Suppose, then, we make it \$18 a week, but as this is so near a thousand a year, suppose we say at the rate a thousand dollars a year?" He was positive that the words "at the rate of" were used.

Witness further testified that plaintiff's work was wholly unsatisfactory and he believed that on account of his age he would never be able to do the work required; that he was present on the 6th day of June when for the first time plaintiff read the minutes of the meeting of March 22nd; that he heard them read but did not pay careful attention to the reading and was not sure whether or not
27 they were as recorded; that his brother, ElBie K. Foltz, called his attention after the meeting to the manner in which the minutes had been reported and the meeting was called for the following day in order that there might be no misunderstanding as to the terms of the employment. That at this special meeting the president erased his name from the minutes and informed the plaintiff that he had not correctly expressed the agreement originally made. Witness declined to erase his name at that time because he was not sure that he had the legal right to do so.

Upon cross-examination he testified that he knew plaintiff was incompetent and would not suit and when asked why he intrusted his business and means of livelihood to an incompetent man, he said that he, Fuller, would not last long; that he would have told plaintiff so at the time but did not want to hurt his feelings; that he thought it was a kindness on his part to let the plaintiff remain until discharged rather than tell him frankly that he did not think him suitable for the work although he said he had no scruples against making these charges against plaintiff at this time in open court.

Mrs. PIERRE M. FOLTZ, being called as a witness, on behalf of defendant, after being duly sworn testified as follows: that she was the wife of Pierre M. Foltz and sister of plaintiff who resided at her home; that she was present at the informal meeting held by the three incorporators of the company on March 17th and that she recalled
28 distinctly that March 17 was day of meeting and she heard the trustees say that plaintiff was to be employed at the rate of one thousand dollars a year.

Thereupon CALEB W. W. FULLER was called in rebuttal in behalf of the plaintiff, and when questioned with reference to testimony of witness for the defendant, that he had not read the minutes of the meeting of March 22, 1910, until June 6th, stated that the minutes were not read because there had not been a meeting of the trustees since March 22nd; that there would not have been a meeting on June 6th but for the fact that one of the trustees had heard that a corporation had no legal existence until the shares of stock were actually issued and that said meeting was called in June by the president for the purpose of issuing the stock; that he, as secretary, had written up the minutes of the meeting of March 22nd within a few days after the said meeting and that he correctly reported the proceedings of said meeting; that the said minute book was left in the

office of the corporation in an unlocked desk and was accessible to the other trustees if they had desired to see it. That he read the minutes of March 22nd at the meeting of June 6th exactly as they appeared in the minute book and as introduced in evidence.

Upon completion of the testimony, attorney for defendant moved the court that the jury be directed to return a verdict for defendant upon the following grounds:

1. That the only testimony introduced in the case on behalf of plaintiff was that witness was to receive one thousand dollars
29 for the first year; therefore it was a question of law for the court to determine whether or not such expression did or did not constitute a contract, and the case should not be submitted to the jury.

2. That the testimony showed conclusively that there could not have been any contract for employment as there had been no meeting of the minds of the parties.

3. That the case should not be submitted to the jury as there were no facts in dispute, the only question being a question of law.

4. That the plaintiff had not denied he had subscribed for the stock and that the same had not been paid for, and that defendant was entitled to a judgment for the amount of the subscription.

The court thereupon overruled the motion of defendant, to which action on the part of the court an exception was duly noted.

The court thereupon charged the jury in the foregoing case, to which charge attorneys for defendant note no exceptions, as follows:

That if they found from the evidence that plaintiff had been engaged by the defendant to perform his services for a period of one year, at a salary of \$1,000, that that would constitute a contract between the plaintiff and the defendant for that length of time, and unless they should believe from the evidence that plaintiff was incompetent and did not comply with the terms of his contract, he would be

entitled to recover; that if they believed plaintiff had been dis-
30 charged without cause, then he would be entitled to recover for the sum of money for which he sued, that is \$125.00, cov-

ering a period of one month and a half, that period being covered in his suit; that if they found, however, that a portion of the compensation was to be a certain number of shares of stock of the defendant company, and he subscribed to them on condition that payment for them was to be made out of his wages, then their verdict should be for the plaintiff for the difference between the amount they owed him, \$125.00, and the portion thereof which would be due on the stock subscription according to the arrangement made between them, being for one month and a half; that, on the other hand, that if they found that there was a contract for one year's services, and the defendant discharged the plaintiff from his employment because he failed to comply with the terms of his contract, and he had failed to do that, that is, if he held himself out as being able to make the lantern slides and was not actually able to make them, and was not able to perform the services which he held himself out as being able to perform, then he would not be entitled to the compensation and consequently their verdict should be for the defendant.

Which said bill of exceptions the defendant, by its counsel, now prays the court to sign and seal, which is accordingly done on this the 29th day of May 1911.

HARRY M. CLABAUGH,
Chief Justice.

I agree to the signing by the Court of the above Bill of Exceptions.

LEON PRETZFELDER,
Att'y for Plaintiff.
FRED B. RHODES,
Att'y for Defendant.

31 *Designation of Record on Appeal.*

Filed June 2, 1911.

* * * * *

The Clerk on making up the record on appeal will incorporate the following:

Dates of filing.

August 6, 1910.	The declaration, particulars of demand and affidavit, judgment of Municipal Court, undertaking on appeal, certificate of Municipal Court.
Feb. 6, 1911.	Motion to vacate judgment.
Feb. 10, 1911.	Motion for new trial.
Feb. 17, 1911.	Order for new trial.
March 21, 1911.	Plea of set off and notice to produce.
March 22, 1911.	Replication.
March 23, 1911.	Judgment.
March 28, 1911.	Motion for new trial.
March 31, 1911.	Order overruling motion and judgment on verdict.
April 10, 1911.	Appeal bond with Illinois Surety Co. as surety.
May 13, 1911.	Order granting extension of time to present bill of exceptions to May 24.
May 19, 1911.	Order granting extension of time to present bill of exceptions, and for filing transcript of record extended to May 29.
May 29, 1911.	Bill of exceptions.
May 29, 1911.	Order granting extension of time for filing record to June 6.

FRED B. RHODES,
Attorney for Defendant.

To Leon Pretzfelder, Attorney for Plaintiff.

32 *Memorandum.*

June 5, 1911.—Time to file record further extended to, and including, June 20, 1911.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,

District of Columbia, ss:

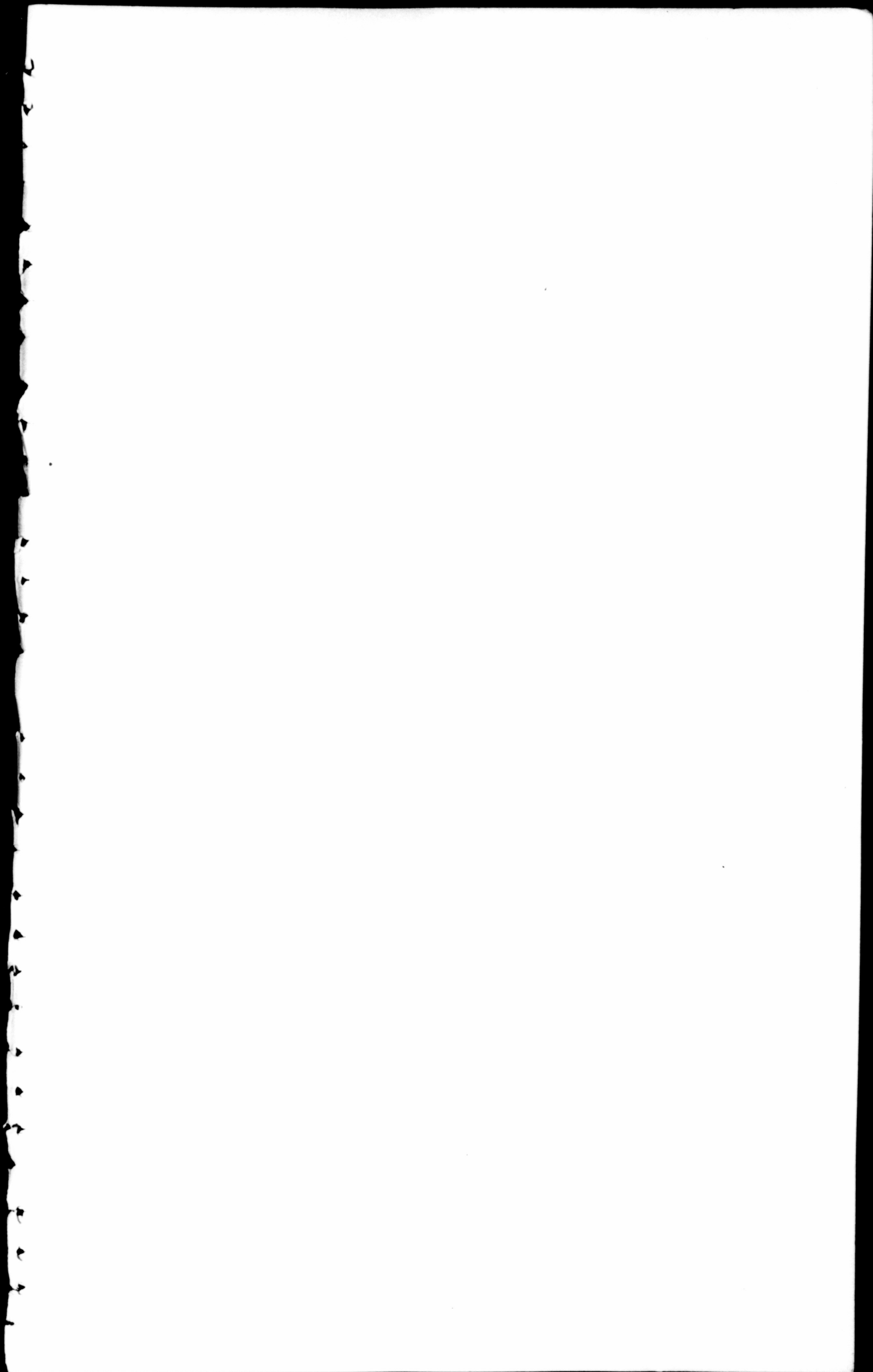
I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 32, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 52830 at Law, wherein Caleb W. W. Fuller is Plaintiff and Foltz & Fuller, Incorporated, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, in said District, this 15th day of June, 1911.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia Supreme Court. No. 2320. Foltz and Fuller, Incorporated, appellant, vs. Caleb W. W. Fuller. Court of Appeals, District of Columbia. Filed Jun- 19, 1911. Henry W. Hodges, clerk.



COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

~~SEP. 13. 1911~~

Henry W. Hodgson
Black.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1911.

No. 2320.

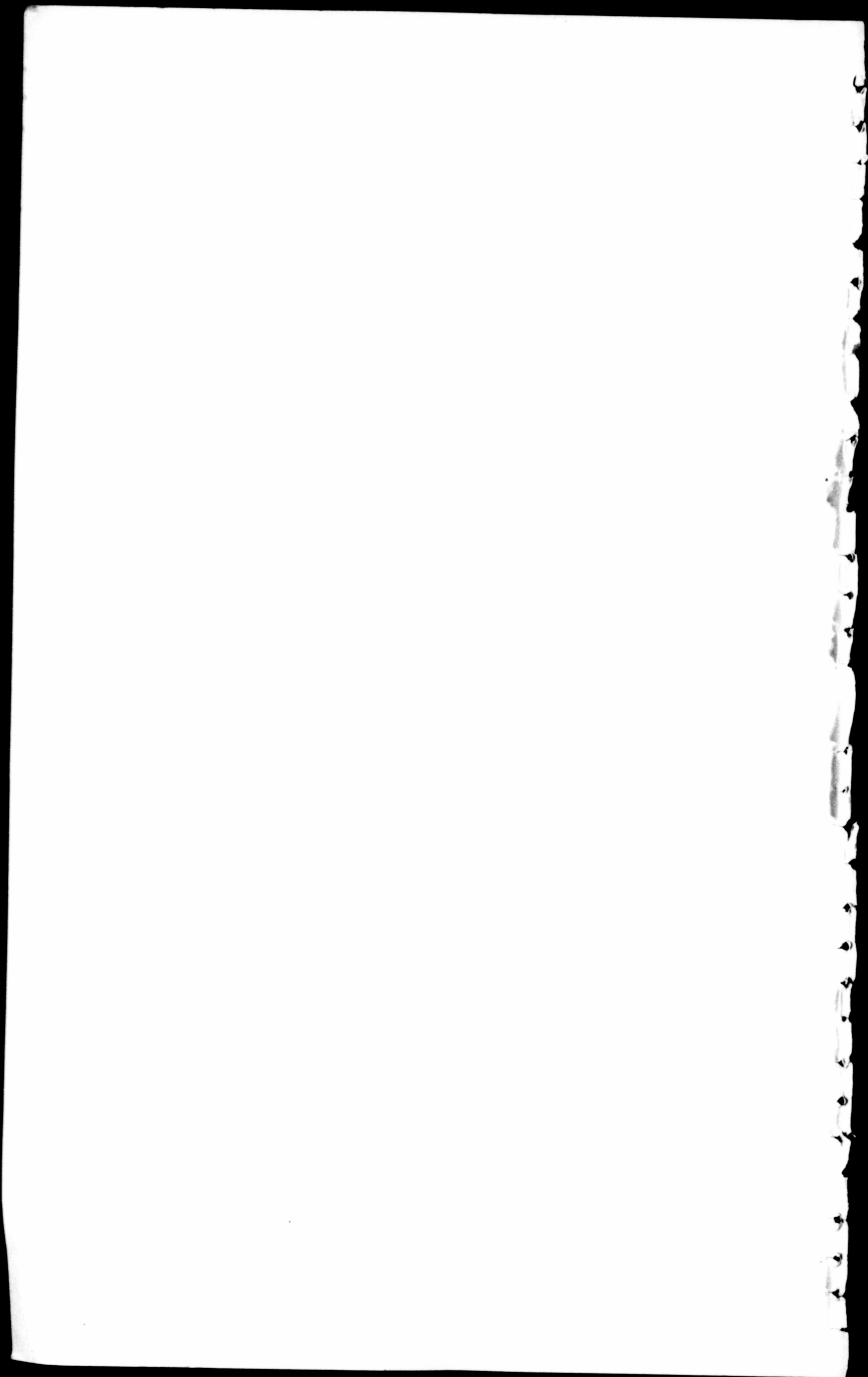
FOLTZ AND FULLER, INCORPORATED, APPELLANT,

vs.

CALEB W. W. FULLER.

BRIEF FOR APPELLANT.

FRED B. RHODES,
Attorney for Appellant.



Court of Appeals, District of Columbia.

OCTOBER TERM, 1911.

No. 2320.

FOLTZ AND FULLER, INCORPORATED, APPELLANT,

vs.

CALEB W. W. FULLER.

BRIEF FOR APPELLANT.

This case comes up on exceptions, reserved to the court's ruling in the trial below, wherein the appellee recovered a judgment entered upon verdict of the jury. The facts are as follows:

Statement of Facts.

On or about March 22, 1910, the appellee, Caleb W. W. Fuller, together with his brother-in-law, Pierre M. Foltz, and Elbie K. Foltz brother of Pierre, organized a corporation known as Foltz and Fuller, Incorporated, the appellant in this case; that at a meeting of the three incorporators

held on March 22, 1910, Elbie K. Foltz was elected President and Treasurer, Pierre M. Foltz, Vice-President, and Caleb W. W. Fuller secretary; that it was understood that none of the incorporators was to receive any salary as officer; that the appellee was employed, beginning March 22, to do certain mechanical work, and was discharged on May 31, 1910; that during his employment he was paid for such mechanical work at the rate of \$1,000 per year, fifty dollars per month being paid in cash and credit given for thirty-three and one-third dollars ($33\frac{1}{3}$) per month on a subscription which he had made for forty (40) shares of the capital stock of the company; that for three or four months prior to his employment by appellant he had lived at the home of Pierre M. Foltz, and that he was not in receipt of any salary for four months prior to his said employment.

Appellee contends that the appellant corporation had employed him for an entire year at a salary of one thousand dollars, and that appellant had no authority to discharge him until the expiration of said year. On August 6, 1910, appellee entered suit against the appellant in the sum of one hundred and seventy-five dollars, salary alleged to have then accrued. In support of this contention the appellee testified at the trial of the cause concerning a conversation which took place at an informal meeting of the three incorporators five days prior to the incorporation of the said company. According to appellee at the said meeting Elbie K. Foltz said:

“Cale will give his time to the company, and we will give him, say, nine hundred dollars per year—well, say, a thousand dollars for the first year; that is about as much as we can afford to start; we will give him, more next year—I hope so anyway.”

In further support of his contention appellee introduced in evidence what purported to be the minutes of the meeting

of the incorporators of the company held on March 22, which contained the following paragraph:

"It was agreed that the secretary should devote his entire time to the business and receive as compensation one thousand dollars for the first year, payable as follows: fifty dollars (\$50.00) cash per month, and the balance credited on his stock account."

The minutes of this meeting were written by the appellee, as secretary, but were not presented by him to the trustees of the company for their approval until a meeting held on June 6, six days after the appellee had been discharged for alleged incompetency. El Bie K. Foltz testifies that when he approved the minutes he had not read them, but, after the meeting of June 6, 1910, upon reading over the minutes of the meeting of March 22, he discovered that the minutes were incorrect, in so far as they related to the terms of employment of appellee, in that the appellee had left out the words "at the rate of" in fixing the terms of the compensation of the appellee. Said El Bie K. Foltz, immediately called a meeting for the next day, June 7, which meeting, on account of the presence of a customer, was subsequently postponed to June 8, at which time the said El Bie K. Foltz removed his name from the approval of the minutes. Pierre M. Foltz testifies that he did not remove his name from the minutes simply because he did not think he had legal authority to do so, but that he was positive that appellee's employment had been fixed simply at the rate of one thousand dollars per year. In his rebuttal testimony, the plaintiff below did not deny or contradict the testimony introduced on behalf of the appellant as to the circumstances under which the minutes of the meeting of March 22 have been approved, nor did he deny that the other two trustees had informed him immediately after the meeting that the minutes had not been correctly recorded.

El Bie K. Foltz, testifies that at the informal meeting of the incorporators, prior to the incorporation of the com-

pany, he had simply suggested that the appellee be given fifteen dollars per week, and the appellee was asked whether or not that would be satisfactory. As appellee did not indicate whether or not he thought that sum sufficient witness then suggested eighteen dollars per week, and he, witness, then added, "Oh, well, as it is so near a thousand, we will say a thousand dollars a year." Witness further testifies that all the incorporators understood that the business was simply experimental, and that it was distinctly understood by all persons concerned, that appellee was only to receive salary while his services were required at the rate of a thousand dollars per year.

Pierre M. Foltz corroborated the testimony of El Bie K. Foltz as to the exact language which had been used at the said informal meeting, and stated further that he was positive that the words "at the rate of" had been used in this conversation.

Mrs. Pierre M. Foltz, wife of Pierre M. Foltz, and sister of the appellee, testified that she was present at the informal meeting hereinbefore referred to, and she heard "at the rate of" used in connection with the employment of her brother, the appellee.

Assignment of Error.

The court erred in submitting this case to the jury, to determine whether or not a contract for a full year's service had been entered into between the appellant corporation and the appellee.

Points and Authorities.

The only evidence submitted by the appellee in attempting to establish a contract for a year's service was his own testimony as to a general and indefinite statement made by one of the incorporators of the company five days before the actual incorporation, and what purported to be a resolution authorizing the employment of the appellee and fixing his compensation upon a yearly basis. As the record shows, however, that the defendant does not deny that the record was corrected to show the correct intention of the trustees, and that both trustees notified the appellee of the inaccuracy of the minutes as recorded, the original minutes could have no legal effect upon the corporation.

But regardless of the alleged inaccurate recording of the minutes by the appellee the resolution in question could have no force in establishing a contract for an entire year's service.

"A resolution of a Board of Directors 'to engage G at a salary of five thousand per year' is a contract terminable at will."

Granger *vs.* American Brewing Co., 55 N. Y., Sup., 695.

This leaves as the only basis for the contention as to a year's contract the following statement made by one of the incorporators:

"Cale will give his time to the company, and we will give him, say, nine hundred dollars per year—well, say, a thousand dollars for the first year; that is about as much as we can afford to start; we will give him more next year—I hope so anyway."

There is no allegation that the other trustees concurred in such employment of appellee, neither is there any testimony as to any act or deed by any one connected with the ap-

pellant corporation attempting to ratify any such language. But granting that the exact language quoted was used by El Bie K. Foltz, and that such statement was binding upon the appellant corporation, the appellant could not nevertheless be held liable under a contract for a year's service. The language quoted clearly provides for an indefinite period of employment.

"There can be no doubt that in this country the rule is, an indefinite hiring is *prima facie* a hiring at will. It is also well settled that a hiring at so much a week, month, or year, no time being specified does not, of itself, make more than an indefinite hiring. It is competent for the parties to show there was a *mutual* understanding. In the absence of such a *mutual* understanding, it is only an indefinite hiring.

Now under the law as we understand it to be, if the plaintiff's case rested solely upon his own testimony, there would seem to be no escape from instructing the jury there was no legally sufficient evidence of a contract for a yearly hiring."

The McCullough Iron Co. *vs.* Wm. C. Carpenter, 67 Md., 554.

In a New York case where the employee was advised by his employer that his salary was to be increased at the rate of ten thousand a year the Court of Appeals said:

"The two questions presented by this appeal are, does the evidence establish a contract of hiring by the year, and, if not, does a general hiring import an employment by the year.

We do not think the plaintiff proved an original contract with defendant whereby he was employed to render service for a year, nor was the evidence so conflicting in this point as to have warranted the trial judge in submitting the question to the jury. A verdict finding that such a contract was entered into by the parties would be set aside as unsupported by the evidence."

The court then quotes Wood on Masters and Servants, 2nd Ed., Sec. 136, as follows:

"If the servant seeks to make it out a yearly hiring the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve a contract to pay one \$2500 a year for services is not a contract to pay at the rate of \$2500 a year for services actually rendered, and is determinable at will by either party.

"Thus it will be seen that the fact that the compensation is measured at so much a day, month, or year, does not necessarily make such a hiring a hiring for a day, month, or year, but that in all such cases the contract may be put to an end by either party at any time, unless the time is fixed, and a recovery had at the rate fixed for the services actually rendered."

Martin *vs.* N. Y. Life Ins. Co., 148 N. Y. Rpts., 117.

In the case of Evans *vs.* St. L., I. M. & S. Ry., 24 Mo., 114, the court set aside the verdict in favor of plaintiff who had been hired for so much a month as he was the only witness as to the contract, and held that the mere fact that the rate of compensation is agreed upon between master and servant at a certain sum per month or per year, does not in the absence of other evidence fix the period at one month, or one year.

In the case of Fritz Finger *vs.* Koch, 13 Mo., 310, the court held that

"An indefinite hiring at so much per day, per month, or per year, is a hiring at will and may be terminated by either party at any time. If the servant seeks to make out a hiring for a year, the burden of proof is on him to establish it by proof."

The court held in the foregoing case that the trial judge should not have submitted the case to the jury.

The court in the case of *Haney vs. Caldwell*, 35 Ark., 156, held that the following letter, although the employment was accepted, did not bind either parties for any definite period.

“DEAR SIR: You are hereby employed to act as my engineer in connection with my contract for the completion of the Little Rock and Fort Smith R. R. at a salary of \$2,500 per annum.”

“An agreement to pay for future services at the rate of a certain sum per year is not of itself a hiring for a year, or for any definite time.”

Prentiss vs. Ledyard, 28 Wis., 131.

“A contract of employment under the rule of the Typographical Union ‘Learners to be paid at the rate of \$8 per week for the first 36 days’ work after which they should be paid as Journeymen’ does not amount to a contract for the full period of 36 days.”

Ill. State Journal Co. vs. Green, 69 Ill. App., 305.

In the case at bar there was no conflict of testimony whatever, with the single exception of whether or not at the informal meeting which took place prior to the incorporation of the company El Bie K. Foltz had used the words “at the rate of.” The courts have uniformly held, however, that the words “at the rate of” under such circumstances would be implied.

The appellant contends, therefore, that the court committed error in submitting this case to the jury for three reasons:

1. The testimony shows clearly that there was no meeting of the minds as to the employment of the plaintiff below for an entire year, and that regardless of any understanding which he might have had from the words used, there was no mutual understanding to such effect.

2. Admitting the testimony of the appellee to have been true no contract for a year was created.

3. The burden of proof having rested upon the plaintiff below to establish the existence of a contract for a year's service the plaintiff has not sustained such burden.

The only person who testified on behalf of the plaintiff below was the plaintiff himself. At the informal meeting hereinbefore referred to there were three other persons present, the plaintiff's sister, the plaintiff's brother-in-law, and El Bie K. Foltz, all of whom testified positively that the words "at the rate of" were used in the discussion of the terms of plaintiff's employment. At the meeting of the trustees at which the resolution hereinbefore referred to was passed there were two other trustees present, both of whom testified positively that his salary was simply fixed upon a yearly basis, and that he was only to be employed from month to month.

It is manifest that the evidence in this case would not sustain any judgment in favor of the plaintiff below.

But admitting that the language used in the employment of plaintiff was as claimed by him, nevertheless, the case should not have been submitted to the jury, but the court should have decided the legal effect of such language.

"Where the terms of an oral contract are shown without any conflict of evidence, its interpretation, as in the case of written contracts, is a question of law for the court."

9 Cyc., 592.

"Where there is no dispute as to the terms of an oral contract its construction is for the court, for it is as much the duty of the court to interpret oral contracts as written ones."

9 Cyc., 786.

“Where the terms of a parol contract are in dispute the jury ascertains them as a question of fact, *and the court determines the legal effect.*”

Pendleton *vs.* Jones, 82 N. C., 249.

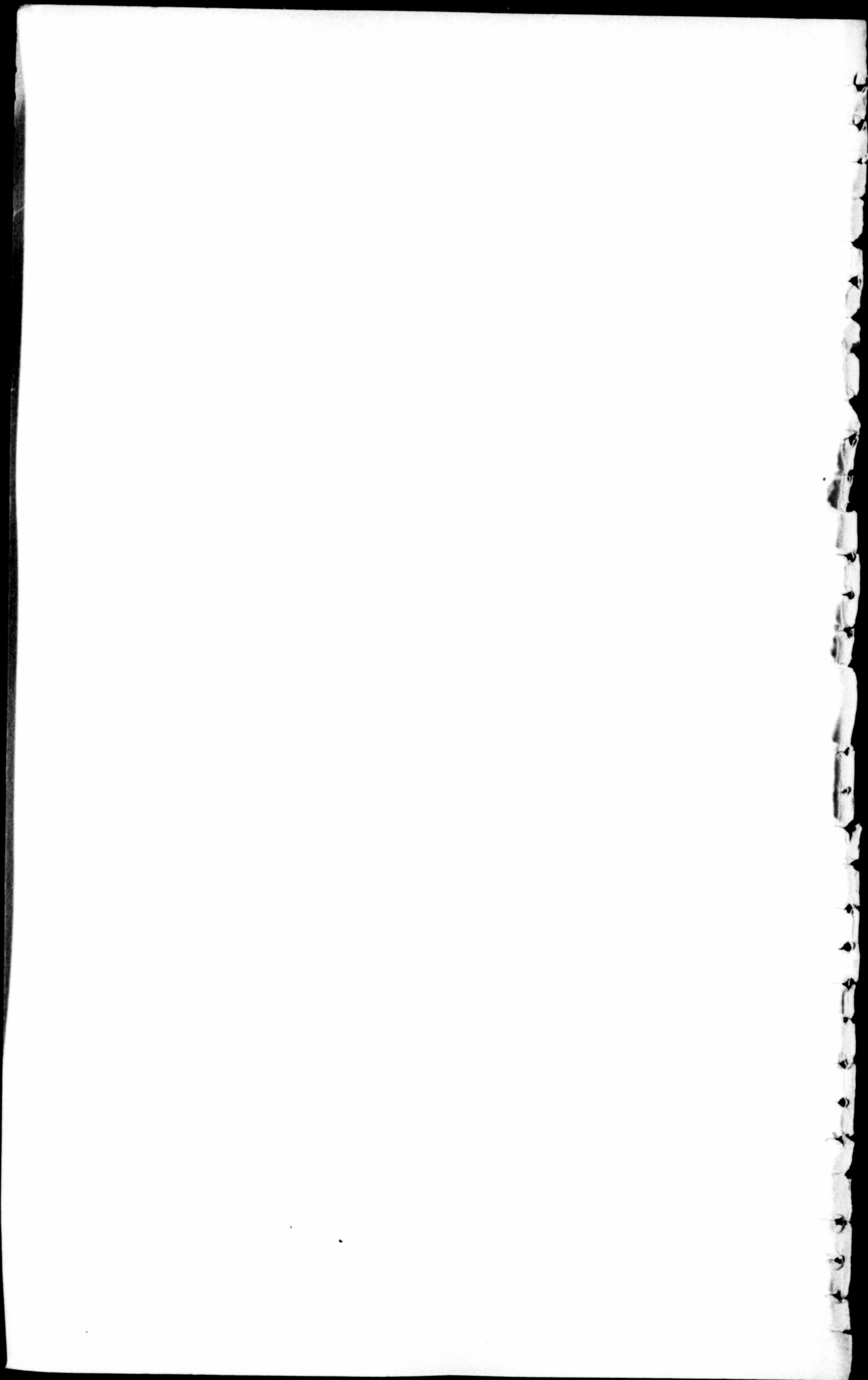
“In an action against a lot owner for damages caused by blasting done on his lot under a contract, it is error to leave the jury to determine whether defendant had under the contract any control over the work as to the manner of its execution, since the interpretation even of oral contracts is for court.”

Braddock *vs.* Elmore, 114 Mo., 55; 21 S. W., 451.

As there was absolutely no question of fact at issue which could have had any legal effect the question arises upon what theory the court could possibly have submitted this case to the jury. The only point at issue was whether or not the language used in connection with the employment of the plaintiff below constituted a contract for a year's hire, and appellant contends that this was a matter which should have been decided by the court. Outside of the language hereinbefore referred to, plaintiff below did not attempt to testify as to the use of any other words or the occurrence of any circumstances whatsoever which might cause him to believe that he was employed for a year.

It is respectfully submitted that for the reasons hereinbefore expressed that judgment should be set aside.

FRED B. RHODES,
Attorney for Appellant.



COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

SEP-25-1911

IN THE

Sherry W. Hodge
Plaintiff

Court of Appeals, District of Columbia

OCTOBER TERM, 1911.

No. 2320.

FOLTZ AND FULLER, INCORPORATED, *Appellant,*

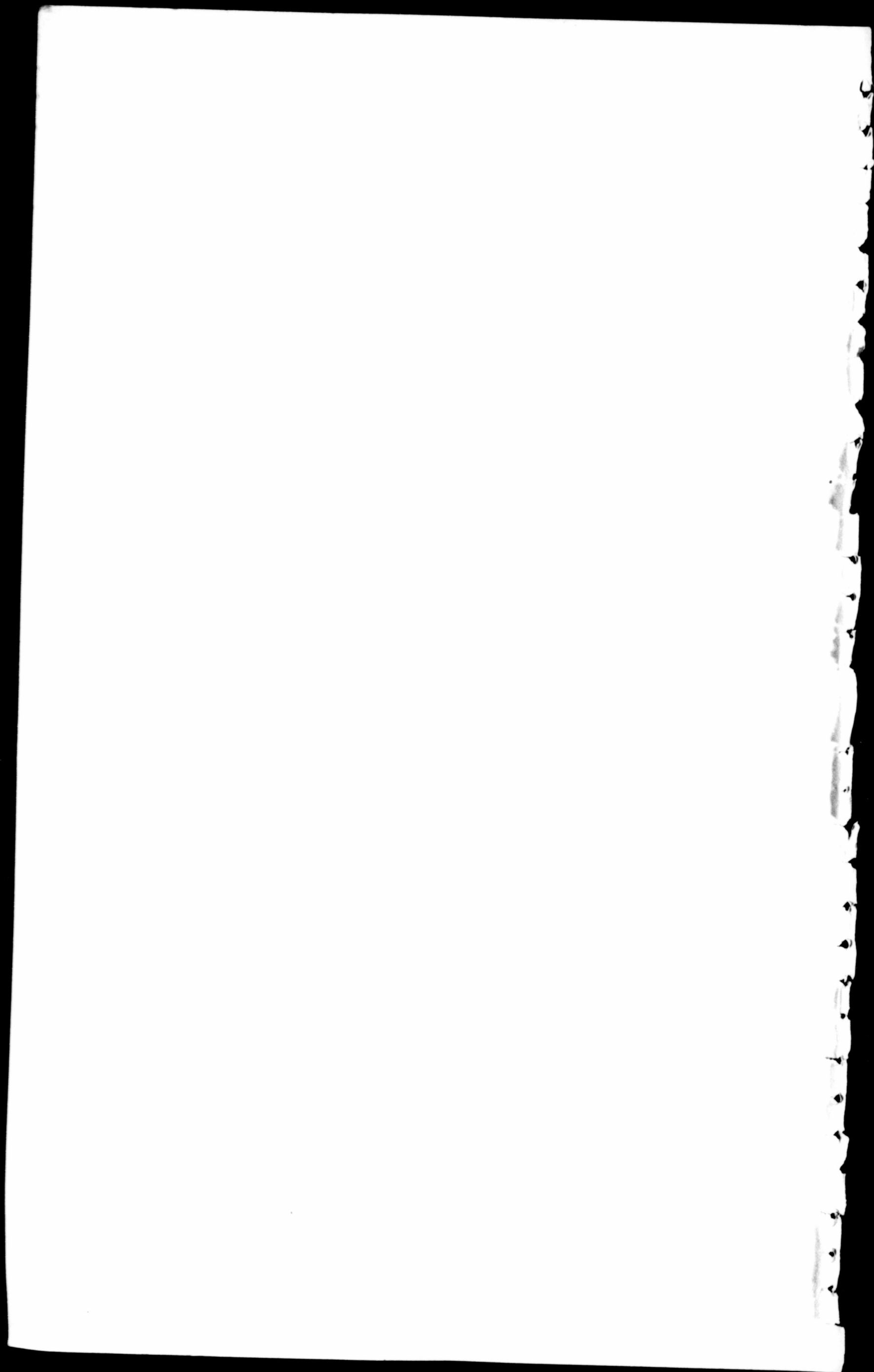
vs.

CALEB W. W. FULLER, *Appellee.*

BRIEF FOR APPELLEE.

LEON PRETZFELDER,

Attorney for Appellee.



IN THE
Court of Appeals, District of Columbia

OCTOBER TERM, 1911.

No. 2320.

FOLTZ AND FULLER, INCORPORATED, *Appellant*,

vs.

CALEB W. W. FULLER, *Appellee*.

BRIEF FOR APPELLEE.

STATEMENT.

This case presents the following state of facts:

Appellee (hereinafter referred to as plaintiff), one of three trustees of appellant corporation (hereinafter referred to as defendant) and secretary thereof, elected to each office for the term of *one year*, was engaged by the defendant as shown by the following resolution:

"It was agreed the secretary should devote his entire time to the business and receive as compensation one thousand dollars for the first year payable as follows: fifty dollars each month and balance credited on his stock account." R., p. 11.

The language of the President of defendant, speaking with reference to the terms of plaintiff's future employment, was as follows:

"Cale will give his time to the company and we will give him, say, nine hundred dollars per year—well, say, a thousand dollars for the first year; that is about as much as we can afford to start; we will give him more next year—I hope so anyway." R., p. 10.

Defendant, after discharging plaintiff before the expiration of the year, and as a defense to its action, contended (1) that plaintiff was discharged for cause, being incompetent, and (2) that he was not employed for one year.

This presented the two issues of *fact*, (1) Was he incompetent? and (2) Was he employed for one year?

In support of the second proposition as to the length of time of employment, defendant contends that the minutes were incorrectly recorded by plaintiff (this contention not being made until *after* plaintiff's discharge) stating that they should have read that he was employed "at the rate of one thousand dollars per year," and although the president of defendant, Elbie K. Foltz, erased his name from the minutes a few days *after* the meeting at which *he had approved* them, he gave no indication in the corporate record itself of the particulars in which the minutes were incorrectly recorded (R., p. 12), and it is contended on behalf of plaintiff that the action of the said Foltz in erasing his name had no legal effect on the minutes whatever. A person can not make a contract, and, after he has discov-

ered that it is not to his interest to be held to it, erase his name and thus effect a cancellation. The said Foltz *APPROVED* the resolution, and after discovering that plaintiff proposed to hold the defendant to the agreement, attempted to nullify it by erasing his name which action could have no legal effect.

Defendant makes a point in its brief of the fact that these minutes were not read to the trustees until after the discharge of plaintiff. Relative to this point, attention is invited to the rebuttal testimony of plaintiff (R., pp. 15 and 16) in which he stated that the minutes were not read because there was no meeting of the company called until June 6th, and telling why the meeting was finally called, and stating that the minutes were written up immediately after the meeting of March 22, 1910, and were accessible to the other trustees in an unlocked desk in the office of the corporation, where they could have been seen had the trustees so desired.

These questions, however, were purely questions of fact, and it is a most elementary principle of procedure that the court had no authority to decide them, his refusal to do which is the only and single error assigned by defendant.

“Where oral testimony of extrinsic disputed facts is necessarily admitted to show whether an uncertain written instrument is a contract or not, *it is a question of fact for the jury, under the instruction of the court, to determine whether it is a contract, and the meaning of it, AND NOT FOR THE COURT.*” *Haney vs. Caldwell*, 35 Ark. 156.

In the trial of the case at bar, parol evidence was necessarily admitted on behalf of both parties, touching upon both of the questions raised, this action being necessary because of the attitude of the defendant; and the jury, by their

verdict, found that the plaintiff *was* discharged without cause, and that he *had been employed for a term of one year*, thus deciding that the plaintiff's testimony as to competency, and the terms of employment were truthful and supported by the facts in the case.

Can the contention of counsel for defendant, that the trial court erred in refusing to instruct that as a matter of law there was no contract for a year's services, be seriously and earnestly advanced? On the one hand, we had the plaintiff's testimony clearly establishing a contract for one year's services, which testimony was supported by the resolution contained in the minutes of the meeting of March 22nd, and further corroborated by the facts and circumstances connected with the case and hereinafter mentioned. On the other hand, we had the witnesses for defendant stubbornly maintaining that plaintiff was hired "at the rate of one thousand dollars per year."

If this statement of defendant's witnesses was the *sole* evidence in the case, then, under the American decisions (the greater number of which hold that a bare hiring at a certain rate per annum does not constitute a yearly hiring), the contention of appellant might have some foundation. But in view of the fact that the plaintiff clearly established his contract as above stated, for the whole year, did the Court have any prerogative in the case other than to let the jury determine the true facts? If the court had not submitted the case to the jury, such action would clearly have been reversible error on behalf of the plaintiff.

The only point to be decided is whether the language used by the president, Elbie K. Foltz, in employing plaintiff, as testified to by plaintiff (the jury having found this to be a truthful statement), and the resolution contained in minutes of March 22, 1910, constitute as a matter of law a contract of employment for one year.

Before proceeding with presentation of the cases in point, however, and in denial of the statement of defendant that plaintiff's testimony was the sole evidence presented, attention is invited to the fact that plaintiff subscribed to forty shares of the defendant's stock at ten dollars per share, making his subscription four hundred dollars; that he was to receive one thousand dollars for the first year, payable monthly as follows: fifty dollars cash, and thirty-three and one-third dollars credited on the stock account (R., p. 10), and that Elbie K. Foltz testified that he knew that plaintiff was without means and that he did not expect him to pay for the stock in cash (R., p. 14). The fact that at the end of one year's services, the plaintiff's subscription would be fully and exactly paid at the rate of a credit of \$33 1/3 per month, as provided in the resolution, and also the knowledge of the president that plaintiff could not pay cash for the stock, and this circumstance, in connection with the plaintiff's election as secretary and trustee of the corporation for a period of *one year*, seem to warrant the assumption that the said Elbie K. Foltz fully intended that plaintiff should be employed for the full year, and that his denial of that fact is nothing more than the result of his attempt to escape liability under his contract, after failing to carry out his part.

DEFENDANT'S AUTHORITIES.

Defendant cites the case of Granger vs. American Brewing Co., 55 N. Y. Sup., 695, as authority for the proposition that the resolution of a corporation, such as the one in evidence in the case at bar, could have no force in establishing a contract for an entire year's service. The case does not stand for the proposition mentioned. The court holds that the wording of the resolution *in the case cited* did not constitute a contract for a year's service. To quote the lan-

guage of the court: "Standing by itself, this agreement was not for a year, but stated an employment which was terminable at the election of either party."

That the acts of a corporation, expressed by resolution, are legally binding upon it, is a proposition too universal for argument. See Wait's Actions and Defences, Vol. 1, p. 219; Vol. 2, pp. 318-342, and cases cited.

The case at bar is even stronger than the usual recitation in the minutes of the secretary of a resolution, which is generally approved or disapproved by oral vote, the resolution in this case having affixed thereto the signature of each of the three trustees, in his own hand-writing, this constituting a binding contract.

The case of McCullough Iron Co. vs. Carpenter resulted in a verdict for the plaintiff by the jury, and the Maryland Court of Appeals affirmed the verdict. 67 Md., 554.

The lower court had instructed the jury that "to enable the plaintiff to recover, he must satisfy the jury that he entered upon said employment for a year, upon the mutual understanding and agreement of himself and defendant that it should continue for a year," and the appellate court decided that this instruction was proper, and all that could be desired by the appellant. That instruction is analogous to the one given by the court in this case.

With reference to the point therein touched upon that the unsupported testimony of plaintiff would not be legally sufficient, while not admitting the general correctness thereof, at the same time, in this case at bar the plaintiff's testimony was supported by the written contract or resolution, and also the other facts which were in evidence, and which are hereinbefore mentioned.

In the case of Martin vs. N. Y. Life Ins. Co., 148 N. Y., 117, the plaintiff was hired at \$5,000 a year, which amount was subsequently increased. The Court said:

"The two questions presented by this appeal are, does the evidence establish a contract of hiring by the year, and if not, does a general hiring import an employment by the year? * * * The correspondence between the plaintiff and the defendant, already referred to, tends to show that plaintiff, when he wrote his first letter, did not consider he was rendering service under a contract by the year, and his assumption of that position in the second letter has the appearance of an afterthought."

The court, having decided that there were no *facts* or *circumstances* importing a yearly contract of hiring, considered the legal effect of a *general* hiring, and decided that such a hiring is not a contract for a year's service.

The distinction between that case and the case at bar is plain and clear-cut. In the case at bar the plaintiff *established* his yearly contract upon evidence which, if true, *was* *legally sufficient*, and the jury have found that evidence to be true.

The case of *Evans vs. St. L. I. M. & S. Ry.*, 24 Mo. App., 114, involved no yearly contract at all. The question was simply one where a person had been employed generally at so much per month, and the court construed it to be a hiring at will.

In *Finger vs. Koch*, 13 Mo. App., 310, the testimony of plaintiff himself showed there was no yearly contract. He testified that the employer had said, in reply to plaintiff's question whether he could stay for the whole year: "If you do your work well, alright, you can stay for the year on the same contract what we got." The Court said:

"It is quite clear from his statements what the witness himself understood to be the contract, to wit: that he was to be employed at the same wages which he had received up to that time from Mrs. Koch, and

that this was to continue for a year IF HE DID HIS WORK WELL, *i. e.*, to the satisfaction of his employer."

Plaintiff was discharged for fighting, thus violating his contract by failing to give the employer satisfaction, and the case is not in point.

In the Haney vs. Caldwell case (*supra*), the plaintiff, who left defendant's service before the expiration of a full year, sued for salary due him for time actually served. The defense was that he had agreed to serve for one year, but the only evidence of such a contract was the letter quoted on page 8 of defendant's brief, and the court held that such language alone would not constitute the contract relied upon. Plaintiff in this case contracted to work for a salary of "\$1,000 for the FIRST YEAR," and this is the difference between the two cases.

In Prentiss vs. Ledyard, 28 Wis., 131, defendant employed plaintiff to work "at so much per year, provided he served faithfully and was strictly temperate." The court held, this being a mere general hiring, *with no other evidence as to intention to continue for any definite time*, either party was at liberty to terminate the services at any time they might desire.

In the case of Ill. St. Journal vs. Green, 69 Ill. App., 305, the court said, speaking of the rule referred to by appellant in his brief:

"The purpose of the rule was to fix the prices to be paid 'learners,' the period of time during which operators should be deemed 'learners' and when one who began as a learner should be recognized as a journeyman and become entitled to receive a journeyman's wages. The rule, as we construe it, had no effect to fix the period or term of employment of either learners or journeymen."

The rule in question was one of the code formulated by the Typographical Union for the government of operators on such machines, and the case clearly has no bearing upon the question at issue.

Briefly summarizing the legal effect of the cases cited by defendant, none of them support the contention that the Court should have determined as a matter of law that there was no contract for a year's service. The farthest they go is to hold that when there is no evidence in the case to show that a *general* hiring was intended to be a contract of service for a *definite* time, then there is no question of fact to be submitted to the jury, and the court should then direct the jury as to the legal effect of the instrument. They hold that where there is a question of fact raised (which there was in the case at bar), the case *must be* submitted to the jury. The Court could not have directed a verdict for defendant without entirely disregarding the testimony of plaintiff.

STATE OF THE LAW ON THE QUESTION.

The majority of American cases seem to hold that a general hiring at the rate of a certain amount for a certain period, in the absence of evidence of understanding, or of facts and circumstances showing a contrary intention, is a contract which can be terminated at will, and not one for the period measuring the salary, although there are cases to the contrary as indicated in Vol. 29, Cyc., p. 974, while the English cases have uniformly held such a hiring to be a contract for one year. The extreme English rule has been adopted by a line of cases in the United States, the strongest of which appears to be *Bleeker vs. Johnson*, 51 How. Practice (N. Y.), 381, which states:

"The English rule is accepted as the law in this country. It is recognized in 1 Parson's Contracts, 518, and no decisions are discovered that infringe upon it."

For the purposes of this appeal, however, it is not necessary to rely upon the extreme English rule. The cases cited below will show that whether the engagement be general or specific, the courts always admit evidence to show what was the real intention of the parties, and consequently, in such cases, refer the matter to the jury:

Tatterson vs. Suffolk Mfg. Co., 106 Mass., 56;
 Norton vs. Cowell, 65 Md., 359;
 Babcock vs. Moore, 62 Md., 161;
 Bascom vs. Shillito, 37 Ohio St., 431;
 Mining Co. vs. Harris, 24 Mich., 115;
 Luce vs. Land Co., 37 Pac., 390;
 Smith vs. Theobald, 86 Ky., 141.
 Laughlin vs. School Dist., 98 Mich., 523;
 Chamberlin vs. Stone Works, 103 Mich., 124.
 Horn vs. Land Ass'n., 22 Minn., 233;
 Kirk vs. Hartman, 63 Pa., 97;
 Hassenfus vs. Packing Co., 15 Pa. Co. Ct. R., 650.

In the case at bar the contract, as contended by plaintiff, was a specific one for one year's employment. The defendant attempted to show that a contract for one year's employment was not intended, and evidence was produced pro and con by each party. The issue was thus clearly defined, and had the court instructed the jury as requested by defendant, he would have usurped the function of the jury.

For the reasons advanced, and in view of the authorities submitted on behalf of both parties, it is respectfully submitted that the verdict and judgment of the court below should be affirmed.

LEON PRETZFELDER,
Attorney for Appellee.

